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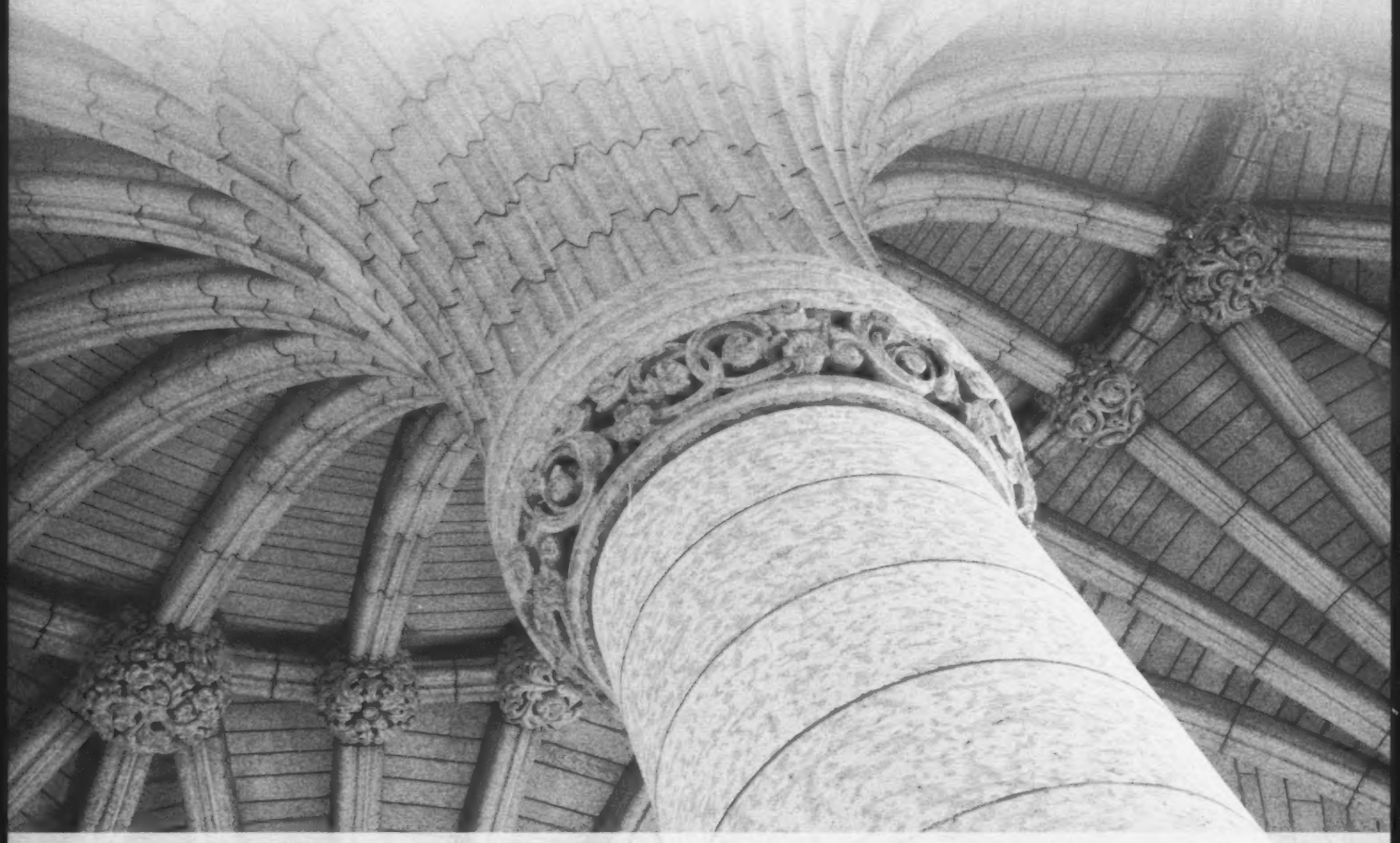
THE PROTECTION OF NET NEUTRALITY IN CANADA

Report of the Standing Committee on Access to Information, Privacy and Ethics

Bob Zimmer, Chair



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42nd PARLIAMENT, 1st SESSION

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Bob Zimmer
Chair

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS

has the honour to present its

FOURTEENTH REPORT

Pursuant to its mandate under Standing Order 108(3)(*h*)(vii) and the motion adopted by the Committee on Wednesday, November 22, 2017, the Committee has studied net neutrality and has agreed to report the following:

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LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That the government of Canada consider enshrining the principle of net neutrality in the *Telecommunications Act*, as proposed in private Member's motion M-168 which is currently considered by the House of Commons. 10

Recommendation 2

That, in the event that the Canadian Radio-television and Telecommunications Commission supports FairPlay Canada's application, the federal government consider using the authority provided under section 12 of the *Telecommunications Act* to ask the CRTC to reconsider its decision..... 15

Recommendation 3

That the Government of Canada seek assurances from the Government of the United States that Canadians' communications with people located in the United States or passing through the U.S. networks to reach another destination, will not be undermined by U.S. Internet service providers, highlighting current North American Free Trade Agreement (NAFTA) obligations to ensure fair access to Canadian businesses and consumers and stressing its importance during NAFTA renegotiation efforts..... 19

Recommendation 4

That the Government of Canada, in light of the increasingly global nature of digital commerce and Internet infrastructure, continue to pursue a dialogue with other countries about transborder Internet commerce, competition and infrastructure issues to promote harmonization of open Internet best practices on an international scale. 19

Recommendation 5

That the Government of Canada encourage the Canadian Radio-television and Telecommunications Commission to proactively use its power to inquire, which is provided for in the *Telecommunications Act*, to ensure that the Internet service providers' practices are consistent with Canadian law..... 20

THE PROTECTION OF NET NEUTRALITY IN CANADA

INTRODUCTION

On 22 November 2017, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (the Committee) adopted a motion to undertake a study on net neutrality.[1]

The Committee held four meetings on the matter, from 6 December 2017 to 15 February 2018, during which it heard from eight witnesses.

This report provides an overview of the current legislative framework for net neutrality, addresses some recent developments in this area, and makes recommendations to the federal government with respect to the protection and application of this principle.

PART 1: CANADIAN LEGISLATIVE FRAMEWORK ON NET NEUTRALITY

A. The *Telecommunications Act*

In Canada, all Canadian carriers, including Internet Service Providers (ISPs), providing telecommunications services are subject to the provisions of the *Telecommunications Act* (the Act) and its regulations. The terms "telecommunications" and "telecommunications common carrier" are defined in subsection 2(1) of the Act:

> ***telecommunications*** means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;
>
> ***telecommunications common carrier*** means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation.

The Canadian telecommunications policy objectives are outlined in section 7 of the Act:

1 House of Commons, Standing Committee on Access to Information, Privacy and Ethics (ETHI), *Minutes of Proceedings*, 1st Session, 42nd Parliament, 6 December 2017.

7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(d) to promote the ownership and control of Canadian carriers by Canadians;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services; and

(i) to contribute to the protection of the privacy of persons.

B. Net neutrality protection measures in Canada

The expression "net neutrality" is not expressly mentioned or defined in the Act. However, the concept is deemed protected under sections 27(2) and 36, which provide the following:

27 (2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

> **36** Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.[2]

Sections 27(2) and 36 of the Act were adopted in 1993, before the term "net neutrality" came into existence. However, the provisions were written in a technology-neutral manner, which has allowed the Canadian Radio-television and Telecommunications Commission (CRTC) to protect net neutrality in Canada through its interpretation of the provisions, outlined in telecommunications decisions, and through the adoption and application of telecommunications regulatory policies. The CRTC is the federal administrative tribunal responsible for regulating and supervising broadcasting and telecommunications in the Canadian public interest.[3]

i. Key decisions on net neutrality by the Canadian Radio-television and Telecommunications Commission

The CRTC defines net neutrality as "the concept that all traffic on the Internet should be given equal treatment by Internet providers with little to no manipulation, interference, prioritization, discrimination or preference given."[4] That definition is not contained in the Act.

In order to determine whether a contravention of the provisions of the Act deemed to protect net neutrality has occurred, the CRTC established two telecom regulatory policies. These policies are used to evaluate whether ISP practices are consistent with the Act. They were adopted following decisions of the CRTC on matters involving net neutrality.

On 6 February 2018, the Committee heard from the CRTC. Christopher Seidl, Executive Director of Telecommunications, explained three key CRTC decisions that have had an impact on the protection of net neutrality in Canada. Two of those decisions led to the adoption of the above-mentioned regulatory policies.

Mr. Seidl described the first key decision as follows:

> The first, in 2009, created a framework against which Internet traffic management practices may be evaluated for compliance with the Telecommunications Act.

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2 *Telecommunications Act*, S.C. 1993, c. 38, ss. 27 and 36.

3 Canadian Radio-television and Telecommunications Commission (CRTC), *About Us*.

4 CRTC, "Strengthening net neutrality," *Internet*.

> Honourable members, the CRTC clearly stated that when congestion occurs, an ISP's first response should always be to invest in more network capacity.[5]

The second decision Mr. Seidl raised prohibited discriminatory behaviour by mobile service providers:

> A few years ago it came to our attention that certain companies were offering mobile wireless services that exempted their own mobile television services from their customers' standard monthly data allowance. Content from other websites or apps, on the other hand, counted against the customers' monthly data allowance. The CRTC issued a decision in 2015 in which we directed these providers to stop giving their own mobile television services an unfair advantage in the marketplace. We also required the companies in question to amend their practices. The CRTC stated that while it is supportive of the development of new means by which Canadians can access both canadian-made and foreign audiovisual content, mobile service providers cannot do so in a discriminatory manner.
>
> This decision was the second step we took to uphold the principle of net neutrality by ensuring that audiovisual content is made available to Canadians in a fair and open manner.[6]

The third decision Mr. Seidl raised dealt with price differentiation:

> In April 2017, we declared that ISPs should treat all data that flows across the networks equally. By enacting differential pricing practices, service providers are in effect influencing consumer choices of which data to consume, the result being that these practices restrict access to content over the Internet, something that the CRTC found was contrary to the Telecommunications Act. ...[7]

ii. Canadian Radio-television and Telecommunications Commission regulatory policies on net neutrality

As indicated above, in evaluating whether or not ISPs practices respect the Act and the principles of net neutrality, the CRTC relies on two telecom regulatory policies.

The first regulatory policy relates to Internet traffic management practices (ITMPs). There are two types of ITMPs: technical (measures to slow a user's traffic, to prioritize traffic, or to detect heavy users in order to limit their bandwidth, for example) and economical (charging more for users whose Internet use exceeds a predefined limit, for

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5 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 February 2018, 0850 (Christopher Seidl, Executive Director, Telecommunications, Canadian Radio-television and Telecommunications Commission).

6 Ibid., 0855.

7 Ibid.

example).[8] Under this policy, the CRTC allows ISPs to implement ITMPs in relation to Internet services, provided that they are transparent about these practices. The CRTC can, however, review an ITMP to determine if it contravenes section 27(2) of the Act.[9]

The second regulatory policy, published by the CRTC on 20 April 2017, represents a new framework for assessing the differential pricing practices of ISPs (when the same or similar products or services are offered to customers at different prices).[10] According to the CRTC, it is using this new framework to strengthen its commitment to net neutrality by declaring that ISPs should treat data traffic equally.[11] The CRTC added that consumer choice, innovation and the free exchange of ideas would be fostered by this framework.[12]

Under this policy, the CRTC can initiate a review of a differential pricing practice to ensure that it does not contravene section 27(2) of the Act. The review can be initiated if the CRTC has received a complaint or by its own initiative. The evaluation criteria used by the CRTC are:

- the degree to which the treatment of data is agnostic (i.e., data is treated equally regardless of its source or nature);
- whether the offering is exclusive to certain customers or certain content providers;
- the impact on Internet openness and innovation; and
- whether there is financial compensation involved.[13]

Protecting net neutrality in Canada, therefore, rests on the CRTC's interpretation of the statutory provisions in the Act and the application of the regulatory policies it adopts in order to fulfill its legislative mandate to regulate and supervise the broadcasting and telecommunications in the Canadian public interest.

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8 CRTC, "Telecom Regulatory Policy CRTC 2009-657," *Decisions, Notices and Orders*, 21 October 2009.

9 Ibid.

10 CRTC, "Telecom Regulatory Policy CRTC 2017-104," *Decisions, Notices and Orders*, 20 April 2017.

11 CRTC, "CRTC strengthens its commitment to net neutrality, consumer choice and free exchange of ideas by citizens," News release, 20 April 2017.

12 Ibid.

13 CRTC, "Telecom Regulatory Policy CRTC 2017-104," *Decisions, Notices and Orders*, 20 April 2017.

C. Explicitly enshrine the principle of net neutrality in the *Telecommunications Act*?

On 6 December 2017, the Committee heard from Michael Geist, Canada Research Chair in Internet and Ecommerce Law, Faculty of Law, University of Ottawa. He did not reject the possibility of enshrining the principle of net neutrality in legislation, but believes that improving the enforcement provisions in the Act may be more pressing:

> In terms of the discussion earlier around enforcement, if I had to pick the best thing we can do to improve the law, I would say improving some of the enforcement is probably more of a priority for me than getting a net neutrality provision, given the way it has unfolded. In fairness, we've seen in the United States that what we thought was well-entrenched policy can change.[14]

Mr. Seidl reiterated that protection of net neutrality is a priority for the CRTC.

Mr. Seidl explained the CRTC's position as follows:

> Net neutrality is the concept that all traffic on the Internet should be given equal treatment by Internet providers, with little to no manipulation, interference, prioritization, discrimination, or preference given. This concept is enshrined in the Telecommunications Act through subsection 27(2), which prohibits unjust discrimination or undue preference, as well as section 36, which prohibits telecommunication companies from influencing the content they transmit unless they have received express authorization to do so from the CRTC. These sections of the act provide the CRTC with the tools and the flexibility to establish and enforce a net neutrality framework that is entirely appropriate and reasonable for Canada.[15]

He added:

> the broadly-worded statutory provisions have stood the test of time and have allowed the CRTC the flexibility required to address more modern concerns. They have been able to adapt to modern technology and needs, including net neutrality.[16]

Mr. Seidl therefore expressed reservations about enshrining the principle of net neutrality in the Act, stating that he would be cautious in terms of putting anything hard into the legislation that might not fit with the flexibility that one might want going forward.[17]

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14 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 December 2017, 1710 (Michael Geist, Canada Research Chair in Internet and Ecommerce Law, Faculty of Law, University of Ottawa, as an Individual).

15 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 February 2018, 0850 (Christopher Seidl).

16 Ibid.

17 Ibid., 0950.

On 13 February 2018, the Committee heard from the following ISPs: Bell Canada, Rogers Communications, Telus and Quebecor Media. None of them believe that net neutrality needs to be enshrined in the Act. All of them feel that the current rules should remain the same.

Pam Dinsmore, Vice-President, Regulatory, Cable, with Rogers Communications explained her reasoning:

> We don't see a need to do that. We think it is somewhat superfluous, because the beauty in the existing regime is that it allows for the commission to look at situations on a case-by-case basis as technology evolves and determine whether or not they are in violation of the commission's net neutrality principles.[18]

Dennis Béland, Vice-President of Regulatory Affairs and Telecom at Quebecor Media Inc., expressed similar thoughts, encouraging the Committee to reflect on the discretionary power that the CRTC already has with respect to net neutrality and "to listen cautiously and warily to those who want you to limit the CRTC's powers in this respect."[19] Robert Malcolmson, Senior Vice-President of Regulatory Affairs at Bell Canada, testified to the same effect, stating that Bell does not believe any changes to the Act are needed because Canada already has some of the strongest net neutrality laws in the world. He also supported Mr. Seidl's remarks cautioning against enshrining more rigid provisions, which could pose a risk to future innovation or could quickly become outdated while 5G and the Internet of Things is developing.[20] Telus representatives, for their part, said that the principles of net neutrality are fully embraced by the Act and the regulatory policies put in place by the CRTC.[21]

On 15 February 2018, the Committee heard from Timothy Wu, a professor at the University of Columbia Law School, in the United States. Mr. Wu coined the term "net neutrality" in a 2003 article he wrote entitled "Network Neutrality, Broadband Discrimination."[22] In response to questions from Committee members, Mr. Wu said that it would be better for Canada to define net neutrality in the Act as opposed to having it interpreted by the CRTC. Mr. Wu argued:

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18 ETHI, *Evidence*, 1st Session, 42nd Parliament, 13 February 2018, 0935 (Pam Dinsmore, Vice-President, Regulatory, Cable, Rogers Communications Inc.).

19 Ibid., 0850 (Dennis Béland, Vice-President, Regulatory Affairs, Telecommunications, Quebecor Media Inc.).

20 Ibid., 0855 (Robert Malcolmson, Senior Vice-President, Regulatory Affairs, Bell Canada).

21 Ibid., 0900 (Ted Woodhead, Senior Vice-President, Federal Government Relations and Regulatory Affairs, TELUS).

22 Timothy Wu, "Network Neutrality, Broadband Discrimination," *Journal on Telecommunications and High Technology Law*, vol. 2, p. 141, 2003.

> I would support that. I think there's good reason at an early stage to do things in regulation.... As long as you write them in a very basic way, with no blocking and no degrading allowed, and you have those principles, I think it's a good idea for legislation.[23]

Based on the testimony heard, the Committee believes that, to prevent any erosion of the principle of net neutrality in Canada in the future, it would be better to explicitly enshrine it in the Act.

Therefore, the Committee recommends:

Recommendation 1

That the government of Canada consider enshrining the principle of net neutrality in the *Telecommunications Act*, as proposed in private Member's motion M-168 which is currently considered by the House of Commons.

PART 2: RECENT DEVELOPMENTS IN NET NEUTRALITY

A. Revocation of net neutrality rules in the United States

The U.S. Federal Communications Commission (FCC) is an independent government agency overseen by Congress that is responsible for implementing and enforcing American communications law and regulations.[24]

On 21 November 2017, the FCC Chairman, Ajit Pai, announced that he would release a proposal the following day entitled *Proposal to Restore Internet Freedom* (the "Proposal") which would be voted on by the FCC in December 2017.[25] In his announcement, Mr. Pai explained that his proposal involves abandoning the regulations implemented in 2015 and returning to the previous regulatory framework.

Mr. Pai explained in the following manner how Internet access was considered before 2015:

> Until 2015, the FCC treated high-speed Internet access as a lightly-regulated "information service" under Title I of the *Communications Act*. A few years ago, the Obama Administration instructed the FCC to change course. And it did, on a party-line vote in 2015;

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23 ETHI, *Evidence*, 1st Session, 42nd Parliament, 15 February 2018, 0910 (Timothy Wu, Professor, Columbia Law School).

24 Federal Communications Commission [FCC], "The FCC's Mission," ***About the FCC***.

25 FCC, *Chairman Pai Circulates Draft Order To Restore Internet Freedom And Eliminate Heavy-Handed Internet Regulations*, 21 November 2017.

> it classified Internet access as a heavily-regulated "telecommunications service" under Title II of the *Communications Act*. If the plan is adopted on December 14, we'll simply reverse the FCC's 2015 decision and go back to the pre-2015 Title I framework.[26]

In other words, the U.S. government, in 2015, moved Internet services in a different category of the *Communications Act*, subjecting ISPs to the more stringent rules that apply to telecommunications services, instead of to the less rigorous rules that apply to information services.

Mr. Pai made the following statement in November:

> Additionally, as a result of my proposal, the Federal Trade Commission [FTC] will once again be able to police ISPs, protect consumers, and promote competition, just as it did before 2015. Notably, my proposal will put the federal government's most experienced privacy cop, the FTC, back on the beat to protect consumers' online privacy.[27]

Mr. Pai's proposal generated numerous negative comments, including those of Mignon Clyburn, one of the five FCC commissioners who indicated that the proposal would undermine net neutrality.[28]

On 14 December 2017, the FCC adopted the Proposal. It explained the effect of returning to the pre-2015 framework in the following manner:

> In place of that heavy-handed framework, the FCC returned to the traditional light-touch framework that was in place until 2015. Moreover, the FCC also adopted robust transparency requirements that will empower consumers as well as facilitate effective government oversight of broadband providers' conduct. In particular, the FCC's action restored the jurisdiction of the Federal Trade Commission to act when broadband providers engage in anticompetitive, unfair, or deceptive acts or practices.[29]

The FCC takes the view that the pre-2015 framework will restore a favourable climate for network investment which will help to close the digital divide, and spur competition and innovation that will benefit the consumers. The FCC further indicates that this framework will protect consumers at a lesser cost to investment unlike the prior rules.[30]

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26 FCC, *Remarks Of Chairman Ajit Pai On Restoring Internet Freedom, Washington, DC*, 28 November 2017.

27 Ibid.

28 See, for example, FCC, *Debunking Chairman Pai's Claims about Net Neutrality Prepared by the Office of FCC Commissioner Clyburn*, 30 November 2017; and FCC, *Commissioner Clyburn Fact Sheet on Net Neutrality*, 22 November 2017.

29 FCC, "Restoring Internet Freedom," ***FCC initiatives***.

30 Ibid.

Two of the five commissioners voted against the adoption of the Proposal. One of the dissenters, Commissioner Jessica Rosenworcel, made the following statements on the day of the vote:

> As a result of today's misguided action, our broadband providers will get extraordinary new power from this agency. They will have the power to block websites, throttle services, and censor online content. They will have the right to discriminate and favor the internet traffic of those companies with whom they have pay-for-play arrangements and the right to consign all others to a slow and bumpy road.[31]

Mr. Wu mentioned that the rule adopted by the FCC will be subject to a court challenge in the U.S. The court challenge will be based on two things:

> One is the idea that the agency, the FCC, doesn't have the authority to pass the law this way. The second is that their changing of the rule that was successful, without giving reasons for doing so, is arbitrary and capricious. The rule in American administrative law is that you can't simply change long-standing administrative rules for purely political reasons. You have to have a change in circumstances; something has to have happened in order for you to change the rule that the industry was relying upon.[32]

The proposal adopted by the FCC on 14 December 2017 is an FCC rule. The FCC has the power to pass rules without approval of the U.S. Congress.[33] The CRTC has similar powers under section 67 of the Act, which allows it to make regulations without approval of the Canadian Parliament.

B. Coalition proposal to create a piracy website blocking system

A coalition of organizations representing Canadian artists, content creators, unions, guilds, producers, performers, broadcasters, distributors, and exhibitors and operating under the name FairPlay Canada, has submitted, on January 29, 2018, a proposal to the CRTC in which it seeks the creation of a mandatory website blocking system in Canada (the "proposal").[34] The coalition has the support of more than twenty-five different organizations, including Bell Canada, Rogers, Québecor, and the Canadian Broadcasting Corporation.[35] Its goal is to ask the CRTC to take action to address the theft of digital

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31 Jessica Rosenworcel, "Statement of Commissioner Jessica Rosenworcel, Dissenting," 14 December 2017.

32 Ibid.

33 ETHI, *Evidence*, 1st Session, 42nd Parliament, 15 February 2018, 0855 (Timothy Wu).

34 CRTC, Telecom Proceedings, Open Part 1 Applications, Application to disable on-line access to piracy sites.

35 FairPlay Canada, *About us*.

content by illegal piracy websites.[36] The proposal is "to create a not-for-profit Independent Piracy Review Agency (IPRA) under the supervision of the Canadian Radio-television and Telecommunications Commission (CRTC) to help prevent international piracy sites and organizations from reaching and harming Canada's creative economy."[37]

Mr. Geist made the following comments about the proposal to create a website blocking agency. It should be noted that at that time FairPlay had not filed its proposal with the CRTC:

> In a recent submission to the CRTC released just in the last couple of days, Bell linked their perceived need for blocking of unauthorized streaming sites and downloading services with the success of its CraveTV service, arguing that blocking access to those sites would result in hundreds of thousands of new subscribers. I think that claim is debatable, but what it highlights, from my perspective, is that the incentives to block content in carrier self-interest, particularly for the very large, vertically integrated companies, is very real[38].

Three ISPs who appeared before the Committee, Bell Canada, Rogers and Quebecor, are part of the FairPlay Canada coalition, and Mr. Malcolmson defended the application the coalition filed with the CRTC. He said that, according to Bell, the proposal is not a net neutrality issue and explained why the coalition's solution is efficient:

> The FairPlay proposal is addressing something that I think everyone agrees is illegal—that is, content theft and copyright infringement.
>
> Given the difficulties of enforcing against copyright pirates, especially those who reside offshore, the FairPlay proposal asks the CRTC to consider whether or not those pirate sources—which are blatant, egregious, commercial sources of piracy—should be blocked. Why is that the remedy? Quite honestly, it's the most practical and expedient remedy: to block these websites as they come in.[39]

Mr. Malcolmson also mentioned that, under section 36 of the Act, the CRTC can authorize an ISP to block or interfere with telecommunications.[40] This is done on a one-off, case-by-case basis. Mr. Malcolmson explained the purpose of FairPlay's proposal:

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36 Ibid.

37 FairPlay Canada, *Taking Action Against Online Theft*.

38 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 December 2017, 1640 (Michael Geist).

39 ETHI, *Evidence*, 1st Session, 42nd Parliament, 13 February 2018, 0930 (Robert Malcolmson).

40 Ibid.

> Rather than going to the CRTC on a one-off basis, we thought a holistic proposal from a broad-based group of stakeholders would give the CRTC the best opportunity to have a look at the implications and consider it a broad basis. That's exactly what it's about; we haven't gone on a one-off basis.[41]

For her part, Ms. Dinsmore explained to the Committee how the coalition believes the proposal would contribute to stopping piracy:

> That said, there is an enormous amount of due process built into the application. The organization that would be set up is to be set up thus because it is an expedient way, with experts, to deal with the triage of the applications that would come in. There would be transparency and there would be a public proceeding in that process, but ultimately the Internet piracy review agency would make a recommendation to the CRTC, and the CRTC itself would make the decision as to whether a website should be put on the blocked list and therefore be required to be blocked by the ISPs.
>
> The alleged pirate would have the full panoply of remedies available to him, if he or she disagreed with the determination of the commission: they could ask for a "review and vary" or they could appeal the decision to the Federal Court of Appeal, just as in any other case that comes before the CRTC.[42]

The CRTC was accepting briefs on FairPlay Canada's application until 29 March 2018. Thousands of briefs have been submitted by individuals and companies, some for and some against the proposal.[43]

The Committee recognizes that it has received limited evidence on the Fair Play proposal and that the CRTC will decide on the application, after having considered all of the submissions it has received. However, the Committee is of the view that the proposal could impede the application of net neutrality in Canada, and that in their testimony, the ISPs did not present sufficient explanation as to why the existing process is inadequate or sufficient justification to support to application. The Committee also remains skeptical about the absence of judicial oversight in the Fair Play proposal and is of the view that maintaining such oversight is critical.

Therefore, the Committee is concerned that, in the event that the CRTC accepts FairPlay Canada's application, net neutrality may be eroded in Canada by allowing Internet content blocking and censorship. These concepts are at odds with net neutrality, which ensures an open Internet.

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41 Ibid., 1005.

42 ETHI, *Evidence*, 1st Session, 42nd Parliament, 13 February 2018, 0930 (Pam Dinsmore).

43 CRTC, *Interventions*, Public process number: 2018-0046-7, Application to disable on-line access to privacy sites.

Of note, section 12 of the Act authorizes the federal government – within one year of a CRTC decision – to vary, rescind or refer the decision back to the CRTC for reconsideration.[44] Moreover, if the CRTC confirms or varies a decision (or does not complete its reconsideration before the date specified in the government's order for reference), the government may, by order, vary or rescind the decision within 90 days after the confirmation or variation (or the specified date).[45]

Based on this information, the Committee recommends:

Recommendation 2

That, in the event that the Canadian Radio-television and Telecommunications Commission supports FairPlay Canada's application, the federal government consider using the authority provided under section 12 of the *Telecommunications Act* to ask the CRTC to reconsider its decision.

PART 3: POSSIBLE IMPACT IN CANADA OF RECENT DEVELOPMENTS IN NET NEUTRALITY IN THE UNITED STATES

A. On the policies of the Canadian Radio-television and Telecommunications Commission

According to the CRTC, the FCC's decision has little or no impact on the CRTC's policies on net neutrality. Mr. Seidl was clear in this regard:

> The Federal Communications Commission's vote will not affect the way in which Internet traffic is treated in Canada. The CRTC has set out its approach to net neutrality, consistent with its powers and duties under the Telecommunications Act, and we will continue to enforce it within Canada.[46]

No other witnesses foresee a change in the CRTC's position on net neutrality due to recent developments in the U.S.

Mr. Geist, for his part, highlighted the differences between Canada and the United States in this regard. He said that net neutrality is a highly politicized issue in the United States and that the FCC's position changes from chair to chair at the regulator. The same is not true in Canada. The government is firmly committed to net neutrality, which has been

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44 *Telecommunications Act*, S.C. 1993, c. 38, subsection 12(1).

45 *Telecommunications Act*, S.C. 1993, c. 38, subsection 12(7).

46 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 February 2018, 0855 (Christopher Seidl).

endorsed at the regulatory level by the CRTC.[47] He does not seem to anticipate any changes to the CRTC's policies on net neutrality.

None of the ISP representatives who appeared before the Committee felt that the FCC's decision would have a major impact on the CRTC's policies. Mr. Malcolmson said that it is important to appreciate that, regardless to the changes to the net neutrality policies in the U.S., Canadians' access to and use of the Internet will remain governed by our rules, which are developed and overseen by the CRTC.[48] He also said that in Canada, thanks to our robust net neutrality laws, it will be business as usual and that the "pipeline will operate in a neutral fashion under the CRTC's rules."[49] Ms. Dinsmore agreed, saying that, if there are changes to net neutrality in the United States, "it's not going to change the way we operate here in Canada, given our robust net neutrality regime."[50]

B. On Canadian consumers

Mr. Geist recommended including a strong and enforceable net neutrality provision in the digital trade chapter that the North American Free Trade Agreement (NAFTA) renegotiations seems to contain. He believes this would be a good step, particularly if the provision has some real teeth.[51]

Based on the information he had on the NAFTA negotiations when he appeared before the Committee, Mr. Geist said the digital trade chapter in the renegotiated agreement will be modelled on the e-commerce chapter in the Trans-Pacific Partnership (TPP), which contains a net neutrality provision. However, he says that provision is very weak. He believes a stronger provision would be helpful.[52]

Mr. Wu made the following comments about the link between net neutrality and NAFTA, or the free trade agreement that will replace it:

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47 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 December 2017, 1635 (Michael Geist).

48 ETHI, *Evidence*, 1st Session, 42nd Parliament, 13 February 2018, 0855 (Robert Malcolmson).

49 Ibid., 0920.

50 Ibid. (Pam Dinsmore).

51 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 December 2017, 1640 (Michael Geist).

52 Ibid., 1700.

> I'm thinking now about a Canadian entrepreneur who comes up with a service and wants to sell it in the United States. That's called "trade in services" in trade terms, and if there's a possibility of its being blocked or action being taken to block it, I think that's potentially a violation of the trade agreement.[53]

Moreover, Mr. Wu recommended seeking assurances from the U.S. government – in trade treaties or in a question about free speech – that Canadians' communications with Americans will not be blocked as a result of recent developments in net neutrality in the United States.[54]

He stated:

> The phone and cable companies in the United States have been empowered—it is quite shocking—to block anything they want to. It's frankly a censorial power. If there is a Canadian site that is criticizing the excessive imperial attitudes of the United States, they can just block it so that no Americans see it. We had thought of this as an open continent, that in North America we can talk to each other, but they can block, they can intercept, they can block all your email communications.[55]

C. On Internet traffic in Canada

In response to questions from Committee members about measures Canada could take to guarantee that Canadian content is not slowed down or throttled as a result of U.S. action, Mr. Seidl said that having strong net neutrality rules will give a clear message to application providers that Canada will ensure ISPs treat them fairly.[56] He said:

> If the jurisdictions are not that friendly, I could see those content providers coming and connecting directly to our Internet providers here in Canada, and you'll see more traffic within Canada.[57]

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53 ETHI, *Evidence*, 1st Session, 42nd Parliament, 15 February 2018, 0905 (Timothy Wu).

54 Ibid., 0915.

55 Ibid.

56 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 February 2018, 0915 (Christopher Seidl).

57 Ibid.

D. On competition

As to the possible impact of corporate changes in the United States in terms of controlling and running the Internet on Canada's use of the Internet, Mr. Seidl explained:

> It's obviously a huge market and a very important market for all the application providers out there. If AT&T, Verizon, and the other major providers start preferring specific applications to an extreme, causing others to fail, obviously that application space will be affected.[58]

Mr. Seidl pointed out that the Internet is a global marketplace and that it's possible that the changes happening in the United States will limit Canadian start-ups.[59] Similarly, Mr. Wu drew a parallel between Silicon Valley start-ups – which he says are not attracting the same kind of investment they used to – and Canadian start-ups, whose development could be hampered by net neutrality changes.[60]

> Imagine you have a Canadian start-up in the Ottawa region or in Vancouver. To reach their customers, they have to start negotiating with American carriers, and they may have no idea who those people are: Verizon, Comcast, AT&T, and so on. It's a greater barrier of entry for Canadian entrepreneurs, even more than for Americans.[61]

Mr. Wu also told the Committee about his concerns regarding the monopolistic behaviour of major U.S. Internet companies and its effects on the Canadian economy. He believes the loss of net neutrality in the United States makes these companies even more powerful.[62]

> ...you see more and more power going towards the biggest Internet companies, ironically, Google, Facebook, and Amazon.[63]

According to Mr. Wu, it is important to keep this in mind because of the influence these major U.S. companies have on the Canadian market.[64]

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58 Ibid., 0920.

59 Ibid.

60 ETHI, *Evidence*, 1st Session, 42nd Parliament, 15 February 2018, 0905 (Timothy Wu).

61 Ibid.

62 Ibid., 0900.

63 Ibid.

64 Ibid.

The Committee believes that, considering the importance of net neutrality and of the issues stemming from the transborder nature of the exchange of content accessible on the Internet, the Canadian government should further study the free-trade aspect of exchanges between Canada and other members of NAFTA in that regard. The government should make sure that a fair access to content on the Internet and to Internet services is maintained for Canadian consumers and companies.

Therefore, the Committee recommends:

Recommendation 3

That the Government of Canada seek assurances from the Government of the United States that Canadians' communications with people located in the United States or passing through the U.S. networks to reach another destination, will not be undermined by U.S. Internet service providers, highlighting current North American Free Trade Agreement (NAFTA) obligations to ensure fair access to Canadian businesses and consumers and stressing its importance during NAFTA renegotiation efforts.

Recommendation 4

That the Government of Canada, in light of the increasingly global nature of digital commerce and Internet infrastructure, continue to pursue a dialogue with other countries about transborder Internet commerce, competition and infrastructure issues to promote harmonization of open Internet best practices on an international scale.

PART 4: LINKS BETWEEN NET NEUTRALITY, PRIVACY AND ACCESS TO INFORMATION

The Committee heard evidence pertaining to how complaints related to telecommunications are dealt with in Canada and to acceptable profit margins for ISPs. Although the second part of this evidence relating to profit margins does not lead to a recommendation in the present report, the Committee considers that the government of Canada should take that question into consideration.

A. Canadian Radio-television and Telecommunications Commission complaints process

Mr. Geist explained that the CRTC allows Canadians to file complaints about net neutrality violations, which they have done on occasion.[65]

> The CRTC would then proceed to investigate and, in some instances, conduct hearings into some of the broader implications raised by the concern. The policies also provide for greater transparency of network management practices, which requires ISPs to disclose how they manage their networks and what their practices will mean for consumers' Internet use.[66]

Mr. Seidl said that the CRTC's most recent statistics show that the CRTC received 19 complaints relating to Internet traffic management practices in 2017.[67] When the CRTC receives complaints alleging practices or approaches that are of significant concern, it holds public consultations and deals with them in a definitive way.[68]

However, Mr. Geist raised the fact that there is a shortcoming in the system because the CRTC relies on complaints from individuals rather than proactively auditing or examining ISP practices.[69]

The Committee agrees with Mr. Geist and recommends:

Recommendation 5

That the Government of Canada encourage the Canadian Radio-television and Telecommunications Commission to proactively use its power to inquire, which is provided for in the *Telecommunications Act*, to ensure that the Internet service providers' practices are consistent with Canadian law.

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65 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 December 2017, 1635 (Michael Geist).

66 Ibid.

67 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 February 2018, 0855 (Christopher Seidl).

68 Ibid.

69 Ibid., 1655.

B. Acceptable profit margins for the Canadian Radio-television and Telecommunications Commission

In response to questions from Committee members about ISP profit margins that the CRTC finds acceptable when it factors in the costs of wholesale services, Mr. Seidl said it's between 15% and 40%.[70]

He also explained that the CRTC does a complex and detailed analysis to get the right balance and the right service level.[71]

> When we set any tariffs, when we look at them for the wholesale side, we look first at all of the costs that go into a provider's network and make sure they can recoup those costs. Then we look at potentially a markup. That's the term we use to identify common costs, such as overhead and so forth. Then, if there's any risk involved, we would look at whether there's a need to ensure that there's enough incentive to the person providing the network to continue to invest and to those using the service to actually invest themselves and go into offering innovative services from that.[72]

Based on the evidence heard, the Committee wishes to express its concerns regarding Canadians' access to affordable Internet services. However, the Committee considers that this issue falls within the mandate of the House of Commons Standing Committee on Industry, Science and Technology and invites this committee to study it.

CONCLUSION

Speaking on behalf of the CRTC, Mr. Seidl said that, with 5G coming soon as the next generation of mobile wireless, there is "no end" to the amount of infrastructure needed to ensure that all Canadians can participate in the digital economy, where everything is connected.[73]

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70 Ibid., 0940.

71 Ibid.

72 Ibid.

73 ETHI, *Evidence*, 1st Session, 42nd Parliament, 6 February 2018, 0940 (Christopher Seidl).

ISP representatives also underscored the importance of changes to their industry that 5G will bring, such as connected cars, the Internet of Things, smart cities and remote medical services.[74]

Based on all the testimony heard, the Committee believes that the increased use of mobiles services in the future should not compromise net neutrality, privacy or access to information by allowing ISPs to tighten their grip on the infrastructure needed by new technological developments while controlling the information on the Internet.

74 ETHI, *Evidence*, 1st Session, 42nd Parliament, 13 February 2018, 0850 (Pam Dinsmore); Ibid., 0850 (Dennis Béland); Ibid., 0855 (Rob Malcolmson); Ibid., 0905 (Michael Guerriere, Chief Medical Officer and Vice-President, Health Solutions, TELUS).

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
As an individual	2017/12/06	82
Michael Geist, Canada Research Chair in Internet and E-commerce Law Faculty of Law, University of Ottawa		
Canadian Radio-television and Telecommunications Commission	2018/02/06	89
Stephen Millington, Acting Senior General Counsel and Executive Director		
Christopher Seidl, Executive Director Telecommunications		
Bell Canada	2018/02/13	91
Rob Malcolmson, Senior Vice-President Regulatory Affairs		
Quebecor Media Inc.		
Dennis Béland, Vice-President Regulatory Affairs, Telecom		
Rogers Communications Inc.		
Pam Dinsmore, Vice-President Regulatory, Cable		
TELUS		
Ted Woodhead, Senior Vice-President and Strategic Policy Advisor Federal Government Relations and Regulatory Affairs		
Michael Guerriere, Chief Medical Officer and Vice-President Health Solutions		
Columbia Law School	2018/02/15	92
Timothy Wu, Professor		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 82, 89, 91, 92, 94, 98 and 104) is tabled.

Respectfully submitted,

Bob Zimmer
Chair